No. 13-19-00379-CV

Court of Appeals for the Thirteenth District of Texas

VALSTAY, LLC

Plaintiff – Appellant

v.

TEXAS WINDSTORM INSURANCE ASSOCIATION

Defendant – Appellee

On Appeal from the 28th District Court
of Nueces County, Hon. Nanette Hasette
Civil Action No. 2017-DCV-4203-A

APPELLANT'S REPLY BRIEF

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Oral Argument Requested

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TO THE HONORABLE COURT OF APPEALS:

Appellant, Valstay, files this Reply brief and would show the Court as follows:

SUMMARY OF THE ARGUMENT

The Texas Windstorm Insurance Association's (TWIA) position on appeal is incorrect and misapplies the law of insurance-coverage disputes. Four undisputed facts prove this point.

First, TWIA insured Valstay's hotel for over a decade with identical policy language for the last few years in that span. 2RR49; 4RR153; CR127-128. Second, that policy insured against damage from wind and hail that occurred during the policy periods. 1SRR 154; 1SRR156. Third, a TWIA-

approved engineer certified that the hotel's roof was in good working condition in March 2013. 1SRR65-67; 2RR53-56; 2RR207. Fourth, after inspecting the roof following Valstay's report of its claim, every witness agreed that wind damaged the roof. 2RR61-64; 2RR78; 2RR83; 2RR127; 3RR70; 3RR72-73; 4RR84; 4RR125-126; 4RR144.

These four facts prove that, during a TWIA policy, a covered peril damaged Valstay's roof, making TWIA's denial of the policy improper and not in compliance with its policy. Section A, *infra*. This evidence satisfied Valstay's burden of proof and shifted the burden to TWIA to prove an exclusion or defense to coverage. *See Gilbert Tex. Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010)(discussing the burdens of proof in insurance disputes).

That left TWIA's limitations defense—that Valstay did not report the claim during within the policies' one-year reporting requirement. TWIA bore the burden of proof on that defense. Section C.1 and D.1, *infra*. TWIA's evidence attempted to show that the hotel's damage occurred "before December 2014." That proof still left time on the one-year reporting window based on Valstay's July 8, 2015 report of claim, which included all potential damage back to July 8, 2014. Section D.1, *infra*.

TWIA's proof that wind damaged the hotel before December 2014 was an incomplete limitations defense because it did not prove that wind damaged the hotel before July 8, 2014. *Id.* TWIA's proof also demonstrated that it conducted a shoddy investigation of Valstay's claim because TWIA never determined when wind damaged the hotel. And it only told Valstay that the problem was maintenance, which never alerted Valstay that a covered claim occurred or that it might want to seek an extension of the one-year reporting period from the Commissioner of Insurance—as allowed by the policies.

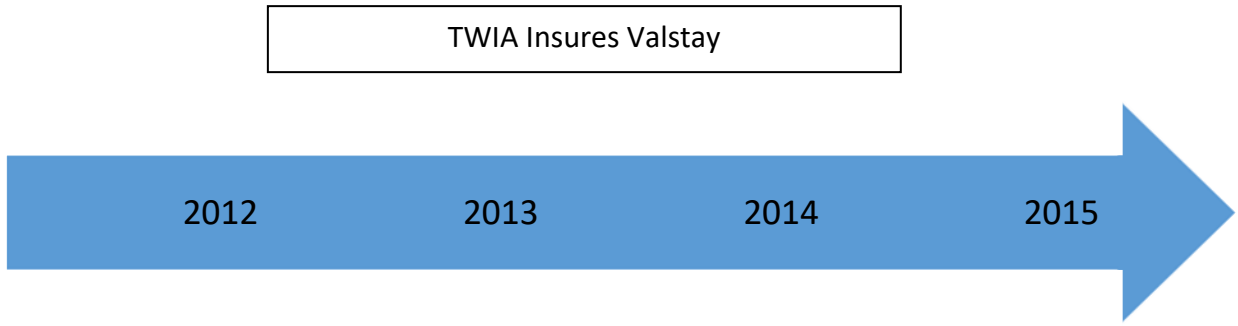
The jury charge, instead of considering all the evidence heard by the jury, focused on the two specific dates, May 24, 2015 for wind and April 13, 2015 for hail. CR734; 5RR7-14. That formulation of the charge made the case a referendum on whether the hotel sustained damage on those two dates. The case at trial, however, was about whether the hotel sustained a covered peril in a policy period and whether Valstay timely reported it, considering the one-year reporting window. Sections A and B, *infra*. On the first issue, Valstay bore the burden of proof. On the second, TWIA bore it. But the jury charge placed the entirety of the burden on Valstay. Valstay preserved this error, it was harmful, and this Court should grant a new trial. Section E, *infra*.

REPLY

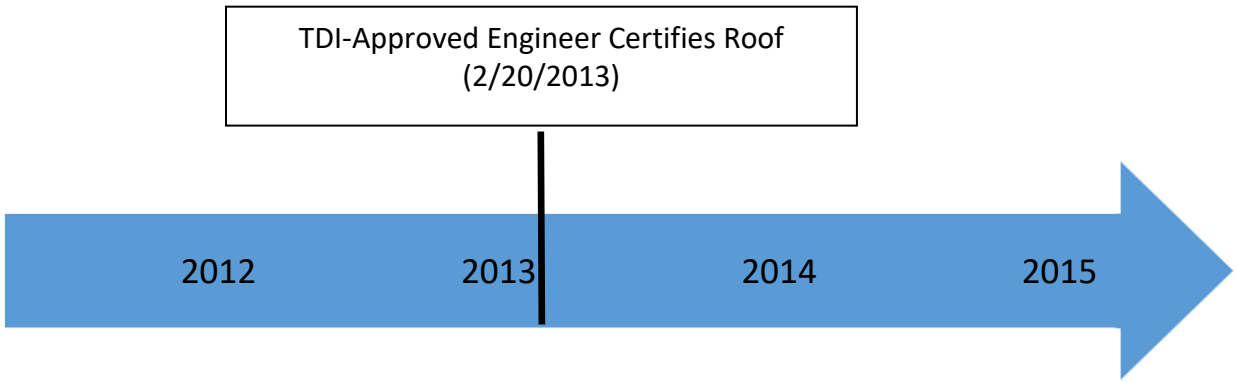
In an insurance-coverage dispute, "[i]nitially, the insured has the burden of establishing coverage under the terms of the policy." *See Gilbert*, 327 S.W.3d at 124. "If the insured proves coverage, then to avoid liability the insurer must prove the loss is within an exclusion. If the insurer proves that an exclusion applies, the burden shifts back to the insured to show that an exception to the exclusion brings the claim back within coverage." *Id.* The Court's Charge should have reflected these burdens of proof in light of the terms of the policy, the pleadings, the evidence presented to the jury, and the law.

A. The Timeline of Events Proves Charge Error.

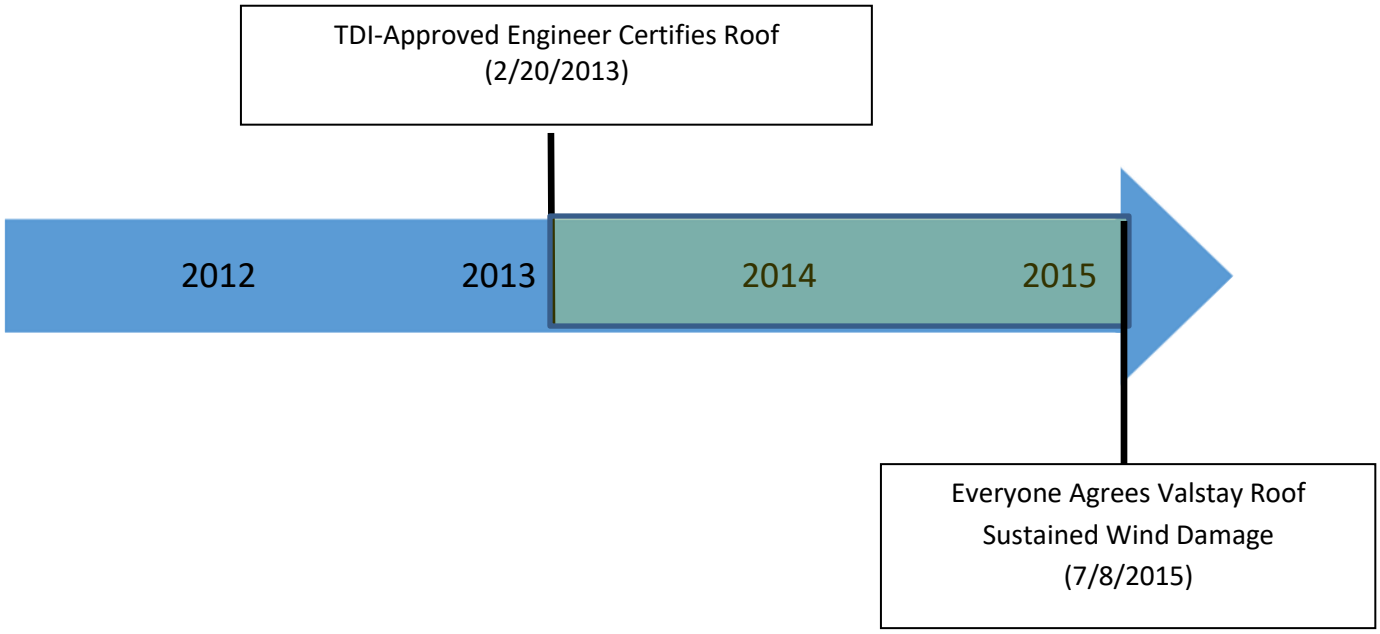
TWIA insured Valstay's hotel for about a decade before Valstay reported this claim in July 2015. 4RR153. The parties stipulated that TWIA provided Valstay with continuous coverage from August 31, 2012 to October 1, 2015 with the exact same policy terms. CR127-128. That stipulation meant that TWIA insured against wind and hail from the engineer's certification that the roof was in good working condition through the July 2015 claim.



In late 2012, Valstay—at TWIA's insistence—repaired the roof. In March 2013, a TWIA-approved engineer certified the roof was in good working condition. 1SRR65-67.



By July 2015, everyone agreed the roof sustained wind damage. 2RR61-64; 2RR78; 2RR83; 2RR127; 3RR70; 3RR72-73; 4RR84; 4RR125-126; 4RR144. (Some witnesses inspecting the property also said the roof sustained hail damage. 2RR102; 2RR114-115; 3RR63-65.)



A covered peril—at least wind—damaged the property at some point after the engineer certified the roof's condition but before Valstay reported the claim. TWIA insured against that peril for that entire time. 4RR153. Whether it was the 2012-2013 policy, the 2013-2014 policy, or the 2014-2015 policy, one of TWIA's policies insured against that damage. Thus, even without knowing which storm caused the damage, this evidence proved coverage under one of TWIA's policies.

TWIA's evidence that disputed which storms damaged the property only reinforced the idea that a covered peril occurred during one of TWIA's policy. That evidence—relying on aerial pictometry—claimed that the roof had sustained wind damage by December 2014. 3RR175 (lines 19-23); 3RR 193(line 15)-194(line 5); 4RR 6(line 22)– 7(line 13). But that proof did not

disprove coverage under a TWIA policy. While it may have proved that Valstay's expert's theory was incorrect, it did not prove the damage occurred prior to TWIA insuring the hotel. Wind damage in November 2014 still occurred during the 2014-2015 TWIA policy; as did wind damage in August, September, and October 2014. The 2013-2014 policy covered wind damage occurring in the year before that. And if wind damage occurred before that but after the engineer's certification, the 2012-2013 policy provided coverage.

The evidence proved a covered event occurred while TWIA insured the policy. That satisfied Valstay's burden of proof to show that one of the TWIA policies should have provided insurance coverage for that damage. The jury charge's limitation to two specific dates denied Valstay the right to have the jury answer whether a covered peril occurred during other periods when TWIA insured the property. And that limitation to just two dates did not account for all the evidence presented to the jury. The jury charge reversibly limited the jury's consideration of the evidence.

B. TWIA's Pleading Argument Misconstrues Valstay's Pleadings and Ignores Its Own Evidence.

TWIA claims that the jury charge's limitation to two dates was not error because those two dates "were based on Valstay's own pleadings and evidence." *Appellee's Brief*, 10-13. TWIA asserts that Valstay "wed itself" to

those two dates and is attempting to "rewrite the record" by pointing to the evidence of other dates. *Id.* at 11. This argument, however, cherry-picks only portions of Valstay's theory of the case and the evidence at trial. The result is that TWIA ignores Valstay's pleading as well as evidence of its own coverage.

TWIA argues that the charge was correct because Valstay alleged that it sustained damage on those two dates. *Appellee's Brief*, 10-13. While Valstay factually alleged storms on those two dates caused wind and hail damage, that is not the only thing alleged. Valstay also alleged that in March 2013, the engineer inspected the roof and found it in proper working condition. CR81. And Valstay factually alleged that a proper investigation by TWIA would have revealed "that when comparing the Haliwell report and the Voss report, *the storm damage to the roof had to have occurred between March 21, 2013 and the date of Haliwell's inspection, at a time when TWIA insured the property, making TWIA's liability for the storm damage clear*." CR83 (emphasis added).

Valstay then asserted a breach-of-contract action premised on TWIA's denial of coverage,

> TWIA has the duty to investigate and pay [Valstay] policy benefits for claims made for damage to its property caused by the hail and windstorm. As a result of this damage, which is covered under [Valstay's] insurance policy with TWIA,

> [Valstay's] property has suffered extensive damage. TWIA has breached this contractual obligation and the subject insurance policy by failing to pay Plaintiff policy benefits for the cost to properly repair the hail and windstorm damage to its property. TWIA has also breached the contractual provision on timely investigating, adjusting and paying [Valstay's] hail and windstorm claim.

CR84. Going further, as part of Valstay's claim that TWIA breached Chapter 2210 of the Texas Insurance Code, Valstay alleged that "TWIA failed to review and reconcile the Haliwell and Voss reports, which showed that the storm damage to the roof occurred within TWIA's coverage of the property." *Id.*

While the pleading mentioned two specific storms, it also factually alleged that wind and hail damaged the property after the engineer's report but before TWIA's inspection by Haliwell, or in the period from March 2013 to July 2015. CR83 Moreover, when it came to Valstay's causes of action, those allegations did not limit the damage to the two specific dates and specifically referenced the window of time from the engineering report to Haliwell's inspection on behalf of TWIA. CR84.

Valstay did not just allege the damage occurred on April 14 and May 25, 2015 and alleged a much broader claim that wind and hail damaged the property at some point during March 2013 to July 2015 when TWIA

insured against those perils.[1] TWIA's argument that the charge conformed to Valstay's pleading is simply wrong.

TWIA's pleading argument is also incorrect because it ignores the evidence presented to the jury. TWIA presented evidence that wind damaged the property before December 2014. But if true, that only proved that a different storm caused damage at a time when TWIA insured the hotel for that covered peril. TWIA insured the property with the same policy terms from 2012 to October 2015.

Proof of damage prior to the reported date of loss did not disprove the existence of coverage. That evidence may have proven the damage might have occurred earlier than Valstay theorized, but it did not disprove a covered peril caused damage while TWIA insured the property. With the engineer's certification of the roof's condition in March 2013, TWIA's evidence, if true, only meant the wind damage occurred between March 2013 and December 2014. But TWIA insured the property for wind damage

[1] To the extent that TWIA claims that these pleadings are insufficient or unclear, TWIA could have specially excepted to clarify Valstay's pleading. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). Indeed, the pleading standard is quite low and only requires fair notice. *Horizon/CMS Healthcare v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). Without a ruling on a special exception, courts liberally construe pleadings to include any claims reasonably inferred from the language used even if the pleading omits elements of the claim. *SmithKline Beechum Corp. v. Doe*, 903 S.W.2d 347, 354-355 (Tex. 1995). Without a special exception by TWIA, this Court should liberally interpret Valstay's pleading.

throughout this entire time. TWIA's evidence proved the existence of coverage and the TWIA's breach of its agreement.

While a trial court bases the jury charge on the pleadings and the evidence, the trial court does not solely base the charge on a one-sided view of the evidence. Instead, the charge must guide the jury for all evidence presented—a jury can reject each side's interpretation of the evidence and come up with its own assessment of what occurred. Based on the evidence presented here, a jury could have concluded:

- Valstay's expert witness' theory of when the wind and hail damage occurred was incorrect;
- TWIA's evidence of when the wind damage occurred (before December 2014) proved wind damaged the hotel;
- TWIA provided coverage against wind damage from 2012-2015;
- The property was undamaged as of March 2013; and
- Because the damage occurred during the window of March 2013 to December 2014 and because TWIA insured the property for that damage during that time, TWIA did not comply with its insurance agreement.

The limitation of the charge to the two dates prevented the jury from evaluating all evidence presented. Indeed, the jury's question about whether it could consider evidence besides the two specific dates proves that it heard evidence besides those two dates and wanted guidance from the trial court about how to assess that evidence. 817; 5RR82. The charge

and subsequent answer to the jury's question failed to provide that guidance.

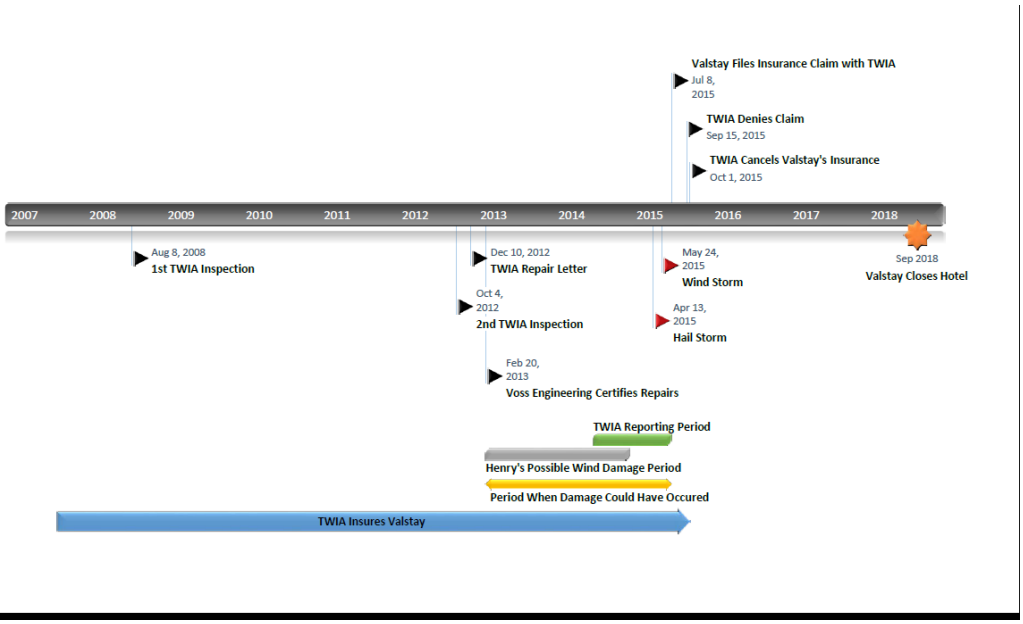
TWIA's pleading argument also misconstrues the cases discussing charging the jury based on the "pleadings and evidence." *Appellee's Brief*, 10-13. That law does not take a limited, focused review of the pleadings and instead looks at the pleading globally to see what a party alleged. The pleadings and evidence need only support "a valid theory of recovery or a vital defensive issue." *Penick v. Christensen*, 912 S.W.2d 276, 287 (Tex. App.—Houston [14th Dist.] 1995, no pet.). That does not look to the pleading for one specific fact alleged. The entire concept of broad-form submission rejects such granulation of the charge to two dates when a party asserts a valid theory.

Here, Valstay alleged a valid theory of recovery—improper denial of its insurance claim or failure to comply with the insurance agreement. CR84. Valstay did not try to submit a fraud claim or a health care liability claim, both of which would have been unsupported by the pleadings. Instead, Valstay asked the trial court to submit a charge based on its breach of contract claim that TWIA did not pay policy benefits for covered perils.

TWIA's hyper-technical view of Valstay's pleadings ignores how the evidence at trial might cause the parties to adjust their positions as the case

proceeds. For example, where an insured has the date of the storm off by one day, the trial court should still submit the coverage question because the evidence showed a potentially covered event occurring during the policy period, even if the evidence did not prove the fact-specific allegation. And that is what should have happened here. While Valstay may have attempted to prove wind and hail occurring on specific dates, that did not mean earlier damage still did not prove the existence of a covered peril during a TWIA policy. That earlier damage still proved Valstay's cause of action—TWIA breached its policy by not paying policy benefits for covered perils. Limiting the charge to two specific dates ignored Valstay's allegations and the evidence.

Indeed, anticipating TWIA's defense against the two specific dates, Valstay (in addition to pleading damage during the window from the 2013 certification to the 2015 report of its claim) explained in opening that the damage occurred during a window of time when TWIA insured the property. 2RR22-23. Valstay's counsel continually referred to the "window" and used a demonstrative timeline of the undisputed dates:



Valstay pointed to the "window" even as it presented evidence of the damage that occurred on two specific dates. 2RR18, 22-23, 26-27; 2RR64-66. By pointing to this "window," Valstay recognized that the jury may disagree with its theory about storms on those two specific dates but still agree that the hotel sustained a covered peril while insured by TWIA. 2RR18, 22-23, 26-27.

In other words, Valstay adapted its presentation of the case by trying to account for a scenario where the jury might disagree with its theory of the case and by explaining how, even under TWIA's version of events, TWIA remained liable. The jury charge's limitation to two dates not only failed to account for Valstay's pleading and the evidence, it also failed to account for Valstay's response to TWIA's defense to the two theorized

storm dates. Regardless, the charge did not account for the evidence presented to the jury.

A court should instruct the jury on all of the evidence heard, not what one side or the other claims to be correct. *Wakefield v. Bevly*, 704 S.W.2d 339, 350 (Tex.App.—Corpus Christi 1985, no writ). ("It is the duty of the trial court to submit such explanatory instructions as are proper so as to enable the jury to render a verdict and to issue such instructions that apply the law to the facts, as shown by the evidence in that trial.")(cleaned up). Rule 278 of the Texas Rules of Civil Procedure is a "substantive, non-discretionary directive to trial courts requiring them to submit requested questions to the jury if the pleadings and any evidence support them." *Elbaor v. Smith,* 845 S.W.2d 240, 243 (Tex.1992). A trial court may refuse to submit an issue only if no evidence exists to warrant its submission. *Id.*

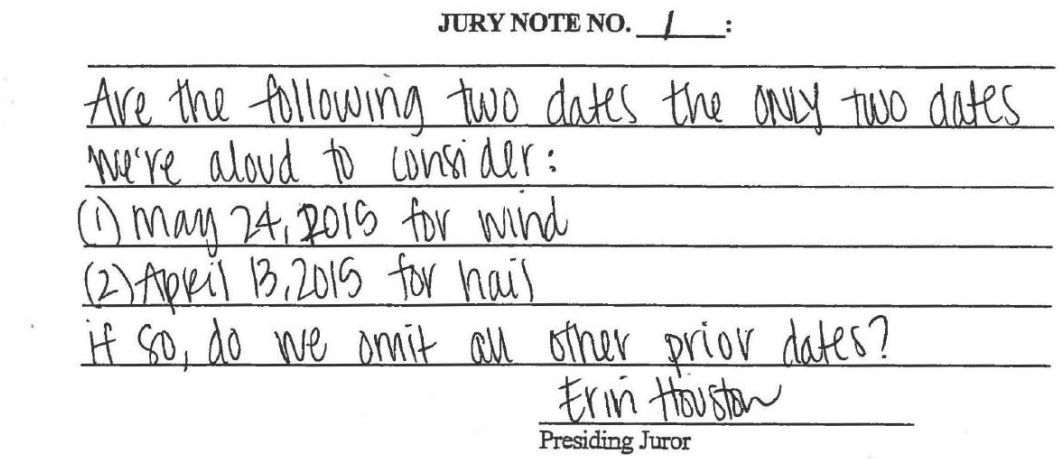
At the formal charge conference, Valstay's counsel worried the charge would cause juror confusion because of the evidence on all the other dates and the "window" when damage occurred. Specifically, Counsel argued:

> By asking whether wind or hail damage occurred under only one specific date, Question 1 does not account for the situation that is proper under the law of where the jury, after reviewing the evidence, disbelieves the main proposition offered by both parties. The scenario where the jury does not believe the wind or hail damage occurred on a specific date, identified in

> Question 1, but that one or both occurred within the applicable one-year reporting period on different dates that would have been covered by the policy.

5RR 8(lines 7-17).

That is exactly what happened. The jury almost immediately wondered what about the rest of the evidence presented:



JURY NOTE NO. 1:

Are the following two dates the ONLY two dates we're aloud to consider:
(1) May 24, 2015 for wind
(2) April 13, 2015 for hail
If so, do we omit all other prior dates?

Erin Houston
Presiding Juror

CR817; 5RR82. This question acknowledged that the evidence presented multiple other dates and that the jury believed that it should evaluate those other dates in answering the question but were charged to ignore. By limiting the jury's consideration, the Court's charge failed to reflect the evidence presented.

C. The Court's Charge Contradicted the Terms of Coverage.

1. The Charge Conflicts with the Insuring Agreement

The declarations pages of every TWIA policy issued to Valstay state that TWIA insured the property "against direct loss resulting from the perils of [w]indstorm and [h]ail...." 1SRR 5, 1SRR 6, 1SRR 7, 1SRR 8, 1SRR 9, 1SRR 130, 1SRR 131, 1SRR 132, 1SRR139. TWIA's insuring clause provides, "[w]e insure for direct physical loss to the covered property caused by windstorm or hail unless the loss is excluded in the Exclusions....This policy applies only to loss which occurs during the policy period shown in the Declarations." 1SRR 154; 1SRR156.

That language does not limit coverage to a specific occurrence or the date an insured reports when a claim occurred. No language in the insuring agreement limits coverage to any specific date within the policy period. As a result, Valstay—to prevail on its claim—only had to establish that wind or hail caused a direct physical loss to its covered property during the time when TWIA insured the property, or from August 31, 2012 to October 1, 2015. *See Texas Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.,* 561 S.W.3d 263, 273–74 (Tex. App.—Houston [14th] 2018, pet. denied)("Thus, to obtain judgment against TWIA for breach of the policy, DISD first had to establish that the direct physical losses to its covered property were caused

by windstorm or hail—in this instance, windstorm or hail during Hurricane Ike."). TWIA agrees that Valstay's burden was to prove wind or hail damaged the hotel during a policy period. *Appellee's Brief*, 14-15 (citing *Gilbert* and *Dickinson* and other cases for the proposition that the insured must show damage during a policy period).

But the policy is not an occurrence-based policy, requiring proof of a specific event. *Appellant's Brief*, 56-67. Instead, the policies insure against specific types of damage (wind and hail) occurring during the policy period. While proof that a specific storm event may sometimes be necessary for a claimant to satisfy its burden to prove coverage, it is not always required. For example, an engineer or TWIA inspector may prove the property to be without damage at the beginning of a policy period, and, at the end of a policy period, everyone who inspects the property may agree that wind and hail have destroyed the property. Even without knowing the specific storm that damaged the property, the insured has shown coverage—the specific peril occurred during the policy period.

That example proves why the trial court's charge contradicted TWIA's policies: it did not provide insurance on two specific dates but instead provided insurance in one-year periods. 1SRR 154; 1SRR156. Coverage turned on damage occurring during one of the one-year periods, not

damage occurring on a specific date. *Id.* While a claimant may prove coverage on a specific date by proving a specific storm caused damage, the policy does not require such proof. Indeed, a series of storms during the policy period may batter the property, anyone of which might have caused a covered peril. Proof of the damage is what the policy requires, not proof of a storm.

Back to the example where an insured reports that a storm occurred on a specific date, but the insured is incorrect because the storm occurred a day earlier. Both dates—the mistaken date and the actual date—are within the policy period. No one would allow TWIA to deny coverage because the insured had the date wrong. Regardless of the date asserted, the covered peril occurred during the policy period. That is all the insuring agreement requires the insured to prove. 1SRR 154; 1SRR156.

Here, everyone agreed wind damaged the property during a time when TWIA insured the property against damage from wind. The charge, instead of asking whether damage occurred during a period of insurance, only asked about two specific dates. That had the effect of denying coverage for all other dates during that policy period. And it had the effect of denying coverage for other policy periods when TWIA insured the property. The charge contradicted the policy language, limited the policy's coverage, and

increased Valstay's burden to show the damage occurred on two dates and only two dates. That was harmful error.

2. The Charge Conflicts with the "Reporting Requirement" of the Policies.

At trial, TWIA justified the two-date limitation in the charge based on the policy's "reporting requirement." (4RR 167-176) (TWIA's appellate position appears to disavow that position, focusing on only on "the claims presented by Valstay." *Appellee's Brief*, 9, 10-13.) But that reporting-requirement argument contradicts the policy. The policy obligates the insured to report a loss within a year but allows the insured to apply for a good-cause extension with the insurance commissioner. 1SRR156. That is an affirmative defense—a limitations defense within the policy. TWIA, not Valstay, should bear the burden of that defense. Even if it is not an affirmative defense, the trial court's charge goes too far in its limitation of what the jury could consider.

Valstay reported its claim on July 8, 2015. 2RR36-37, 2RR208-209, SRR 165. Under the reporting-requirement provision, that meant Valstay satisfied that requirement for any damage that occurred from July 8, 2014 through July 8, 2015. The trial court's instruction that limited the jury's consideration of the damage to just two potential dates contradicted the year-long reporting requirement.

The trial court should have asked whether the TWIA failed to comply with the agreement "for all hail or wind damage, if any, caused between July 8, 2014 and July 8, 2015." That charge construction would account for the evidence presented and the policy's reporting requirement. The court, however, closed the "window" of coverage from the actual covered period of (2005 - 2015), past the stipulated coverage with identical policy language (August 31, 2012 to October 1, 2015), and past the one year "reporting period," just leaving only two days on which the damage could have occurred. That was ran afoul of the policy language (allowing insureds a year to report damage), the pleadings (asserting a claim for damage within the year-long reporting window), and the evidence presented to the jury.

D. The Court's Charge Contradicted the Law on Which Party Had the Burden of Proof.

As discussed above, the burden of proof in insurance disputes is well settled. The insured first establishes coverage, then the insurer must prove an exclusion or limitation, and if so, then the insured must prove an exception to the exclusion. *Gilbert*, 327 S.W.3d at 124. Question 1, directly or indirectly, included two affirmative defenses. CR734; 5RR7-14. That improperly placed the burden of proof on Valstay to disprove those affirmative defenses instead of putting TWIA to its burden. One affirmative defense was the policies' limitations provision, requiring the insured to

report claims within a year of the damage. The other required Valstay to prove that TWIA knew, or should have known, about the damage after reasonable investigation before the jury could find that TWIA did not comply with the agreement. The inclusion of either was harmful error.

1. TWIA's Limitations Defense Was Never Proven, and the Charge Incorrectly Put the Burden on Valstay.

The policy language and statutes governing TWIA create a one-year limitations period for claims against TWIA, requiring the insured to "file a claim…not later than the first anniversary of the date on which the damage to the property that is the basis of the claim occurs." TEX. INS. CODE ANN. § 2210.573(a). That statute, and the policies' equivalent language, is a limitations period,

> Section 2210.573(a) sets forth a clear and unambiguous one-year limitations period for when a claimant may file a claim with TWIA, subject to a 180–day discretionary extension from the commissioner of insurance.

Housing & Community Services, Inc. v. Texas Windstorm Ins. Ass'n, 515 S.W.3d 906, 910 (Tex. App.—Corpus Christi 2017, no pet.). Limitations is an affirmative defense, putting the burden of proof on TWIA. *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010); TEX. R. CIV. P. 94.

An affirmative defense "acknowledges the existence of prima facie liability but asserts a proposition which, if established, avoids such

liability." *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015)(cleaned up). Functionally, that was, and must be, TWIA's argument at trial. Merely proving that the damage occurred before December 2014 did not show a lack of coverage. Instead, as discussed, that evidence proved one of TWIA's policies issued to Valstay after the engineer's certification covered the agreed-upon wind damage. And to circumvent the effect of coverage from an older policy, TWIA had to rely on the policies' (and statute's) one-year limitations provision.

The only problem (and it is a big problem) with that defense is that TWIA's proof did not go far enough in proving the damage occurred outside of the limitations period. TWIA's version was that the damage occurred before December 2014. But Valstay's report of hail and wind damage on July 8, 2015 carried with it all damage that occurred between July 8, 2014 and July 8, 2015—or a year's worth of wind and hail damage. Because TWIA bore the burden to prove that the damage occurred outside the one-year reporting requirement, TWIA needed to show that the damage occurred before July 8, 2014. By only showing the damage was before December 2014, TWIA failed to meet its burden on its affirmative defense.

Even though it pleaded this limitations period as an affirmative defense, TWIA claimed at trial that it was not an affirmative defense and

that Valstay had the burden to prove the claim occurred within one year of reporting. CR16-17; 4RR 167-176. That assertion missed the mark because Valstay proved that the damage occurred during one of the multiple policies TWIA issued covering the hotel from wind and hail damage from the time of the engineer's certification until Valstay reported the claim. Regardless of when the damage occurred, it was within one of those policies. That triggers TWIA's burden to prove its affirmative defense of the one-year reporting requirement.

The engineer certified the roof's good condition in March 2013. 1SRR65-67; 2RR53-56; 2RR207. So if the wind damage occurred in April 2013, that wind damage would be within the terms of the insuring agreement. TWIA could, at that point, claim that the limitations period for reporting claims excluded that damage from coverage because it was not reported until July 2015. But, as an affirmative defense, TWIA bore the burden to show that Valstay reported the claim beyond the one-year period. As its corporate representative testified, TWIA utterly failed to do so. 2RR58 (lines 3-14).

Here, we know two things for certain—the roof was not damaged in March 2013 and it was damaged in July 2015. With TWIA insuring against wind for that entire period, that proves coverage under one of the TWIA

policies. To satisfy its burden on its limitations defense, TWIA needed to prove the damage occurred more than a year before Valstay reported the claim, or before July 8, 2015. TWIA failed that burden because nothing proved when, before December 2014, the damage occurred. Proof that the damage occurred before December 2014 did not prove that it occurred before July 8, 2014.

TWIA has now backed away from what it told the trial court. But it claims that "nothing in Question 1 required Valstay to prove that its claim was filed *within the one[-]year limitations period*." *Appellee's Brief*, 9 (emphasis added). The flaw with that argument is apparent when TWIA defends the charge's two-day limitation.

TWIA references the limitations period and states "the damage had to have occurred no earlier than July 8, 2014," and "there was no evidence that the damage occurred at any other time within the one year filing period." *Appellee's Brief,* 11, 13. Later, TWIA again (trying to defend the charge's use of just two days) refers to the one-year reporting period and claims that there was "no probative evidence that Valstay's property sustained damage…within that time period." *Appellee's Brief*, 17. Both arguments place the burden on Valstay to prove that its claim was within the reporting period as opposed to placing the burden on TWIA to prove its

affirmative defense.

TWIA cannot defend the charge's use of just two dates without referring to its affirmative defense. Indeed, the evidence established that everyone agreed wind damaged the property between March 2013 and July 2015. Whether that wind damage occurred on May 24, 2015 (as instructed in the charge) or some other date in that span does not change the fact that TWIA insured Valstay for wind damage from March 2013 through July 2015. The reporting-requirement affirmative defense would potentially limit coverage from March 2013 until July 8, 2014 because no claim for that damage was timely reported. But that affirmative defense requires proof that the damage occurred before July 8, 2014. No evidence proves that here.

Not only did the charge limit multiple year-long policies to just two days, it also gave TWIA the benefit of its reporting defense and allowed TWIA to argue below—and in this Court—that Valstay did not prove the damage occurred during the one-year reporting period. That puts the burden on Valstay when it belongs on TWIA. A trial court must word the charge so that the jury understands which party bears the burden of proof on the issue. *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.3d 875, 884 (Tex. App.–Dallas 2008, pet. denied). And because the charge

commingles an invalid affirmative defense (that was unproven), it is presumed to be harmful under *Casteel*. *Brannan Paving GP, LLC v. Pavement Markings, Inc.,* 446 S.W.3d 12, 24 (Tex. App.—Corpus Christi 2013, pet. denied).

2. The Knowledge Requirement Was an Affirmative Defense that TWIA Never Pleaded Nor Proved.

Not only did the charge improperly include a limitations defense, but it also included a requirement that Valstay prove that TWIA knew, or should have known, about the damage after a reasonable investigation. CR734; 5RR7-14. That knowledge requirement is an affirmative defense because it acknowledges that coverage could exist but avoids that coverage if TWIA did not know and could not have known about the damage. *Zorrilla*, 469 S.W.3d at 15.

Notably, TWIA never pleaded this affirmative defense. CR 13-20. Nor is it a requirement to establish coverage under the policy or to prove the statutory claim. Indeed, all the policy and statute require is proof that wind or hail damaged the property during a policy period. Valstay also did not try the issue by consent because it objected to the submission of the knowledge requirement in that TWIA never pleaded or proved this defense. 5RR11. These problems alone prove charge error—even if the question had put the burden of proof on TWIA.

TWIA claims that the knowledge instruction did not require Valstay to disprove the affirmative defense and

> only required proof that the covered *damage was discoverable through investigation*, and *there was no issue in this case* that the alleged wind or hail damage at issue was not discovered or could not have been discovered.

Appellee's Brief, 14 (emphasis added). But the policy and statute have no requirement that "the covered damage [be] discoverable through investigation." Thus, Valstay should have borne no burden to prove what was discoverable. *Gilbert,* 327 S.W.3d at 124 (discussing the insured's burden of establishing coverage *under the terms of the policy*).

TWIA claims that, without a knowledge requirement, Valstay would bear no burden to prove coverage. *Appellee's Brief,* 15-16. But this argument ignores the requirement from *Gilbert* (and all of the well settled case law on an insured's burden) that the insured must prove coverage under the policy. *Gilbert,* 327 S.W.3d at 124. Even under the statute, an insured must prove denial was improper, which requires proof that the insured suffered a covered loss. TEX. INS. CODE ANN. §2210.576(a).

If, hypothetically, the evidence supported a denial of coverage because TWIA did not know and could not discover the damage, then TWIA—not Valstay—should bear the burden of that confession and avoidance matter. Indeed, if a covered peril existed but was not

discoverable, that might justify denying coverage. But TWIA never pleaded nor proved this defense.

Another problem from the inclusion of this "knowledge" requirement is that this matter was apparently not an issue in the case. TWIA admits that "*there was no issue in this case* that the alleged wind or hail damage at issue was not discovered or could not have been discovered." *Appellee's Brief*, 14 (emphasis added). TWIA makes this argument to show harmless error, but it underscores why the charge should have never included the issue in the first place.

Contrary to TWIA's harmless error suggestion, the inclusion of the knowledge requirement was harmful. Knowledge is not an element of a breach of contract or part of the statutory cause of action. The inclusion of the knowledge requirement made Valstay prove that TWIA had the requisite knowledge or could have obtained it with a proper investigation. That requirement was harmful because it required Valstay to prove something that is not an element of its cause of action.

The knowledge requirement was also harmful because it is part of a bad-faith claim—not the underlying coverage dispute. Here, TWIA concluded that the storm did not occur on the dates suggested by Valstay because, under its theory of the case, the damage occurred before

December 2014. But TWIA stopped investigating at that point.

"Before December 2014" still included a time when TWIA provided coverage (because it insured Valstay continuously with the same language since 2012) and still included a time within the one-year reporting requirement. That proved that TWIA conducted an unreasonable investigation by not determining when the damage occurred.

Moreover, TWIA did not tell Valstay that it sustained damage from a covered peril but outside the reporting requirement—its apparent defense later. 7SRR 348-350. Instead, TWIA said the damage was due to a lack of maintenance. *Id.* If TWIA had informed Valstay that it had sustained wind damage, as its witnesses admitted at trial, Valstay could have investigated to determine that the damage occurred in a covered window. Or Valstay could have asked the insurance commissioner for the statutory 180-day good-cause extension. But none of these bad-faith issues are part of the breach of contract claim, and thus it was harmful error to have a jury decide a knowledge requirement as part of that cause of action.

The inclusion of the knowledge requirement in Question 1 commingled valid theory (breach of contract) with an invalid theory (the knowledge requirement) in the same question.CR734. Because a breach of contract claim does not have a "knowledge" element, Question 1 improperly

incorporated it into both the wind and hail sub-issues in that question. Neither the trial court nor this Court can determine if the jury's "no" answers to both were due to the "knowledge issue" or Valstay's failure to otherwise meet its burden of proof. Under *Casteel*, this inclusion is presumed to be harmful and reversible error. *See Brannan Paving*, 446 S.W.3d at 24.

E. Valstay Properly Preserved Its Issues on Appeal.

"The procedural rules governing jury charges state in pertinent part that '[f]ailure to submit a question may not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment'... the rule continues that an objection is sufficient to preserve error 'if the question is one relied upon by the opposing party.'" *R.R. Comm'n of Texas v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 571 (Tex. 2016). "The preservation requirements of rule 278 apply when a party complains of an omission of an instruction; it does not apply, however, when a party argues that another party's proposed instruction be omitted entirely." *Brannan Paving GP, LLC,* 446 S.W.3d at 19. Under all of these standards, Valstay has preserved the issues it presents on appeal.

First, Valstay presented a substantially correct version of Question 1, on which the Court rejected the instructions. CR707. That question correctly instructed that "TWIA failed to comply with the insurance policies if it failed to pay for any damage caused by windstorm or hail during the policy periods of August 31, 2012 to October 1, 2015," which is the stipulated period of coverage. CR707. A similarly instructed question was upheld by this Court last month. *See Texas Windstorm Ins. Ass'n v. James*, No. 13-17-00401-CV, 2020 WL 5051577, at *28 (Tex. App.—Corpus Christi Aug. 20, 2020, no hist.) (holding "We find no commingling of valid and invalid theories here. The trial court issued the following objected-to instructions: ...The TWIA Dwelling Policy covers direct physical loss to the covered property caused by windstorm or hail *during the policy period*.")(emphasis added).

Even though it did not have to, Valstay also submitted a substantially correct question on TWIA's affirmative defense of limitations, which was also rejected. CR 710. It asked, "[d]id the damage to the property that is the basis of Valstay, LLC's claim occur prior to July 8, 2014?" CR710.

In addition to tendering substantially correct questions, Valstay also objected to and received rulings on each and every issue presented for review at the formal charge conference. 5RR 7-13. Finally, Valstay

presented each issue in its motion for new trial, which was denied. CR755-817; 827.

As discussed herein and in Appellant's Amended Opening Brief, the Court's Charge in this case contained multiple harmful errors. As a result, this case must be remanded for a new trial. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 44 (Tex. 2007)("[W]here…the theory of recovery was defectively submitted, as opposed to a situation where the plaintiff 'refused to submit a theory of liability' after defendant's objection, the proper remedy is to remand for a new trial.")(cleaned up); *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 338 (Tex. 1995)(reversing the judgment of the court of appeals after finding jury charge error and remanding the case to the trial court for further proceedings).

PRAYER

Wherefore, premises considered, Valstay respectfully requests that this case be reversed and remanded for a new trial, that Valstay be awarded its appellate costs, and that Valstay receive any other relief as may be proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in word processing software used to produce this document, I certify that the length of this document is 6,706 words excluding those portions of the document identified in Tex. R. App. P. 9.4(i).

/s/Robert W. Loree
Robert W. Loree

CERTIFICATE OF SERVICE

I certify that Appellant has served a true and correct copy of the foregoing document on October 5, 2020 by to all counsel of record:

/s/Robert W. Loree
Robert W. Loree

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